U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 28 January 2003

Case Nos.: 2001-LHC-3240
2001-LHC-3241

DOL Nos.: 10-39218
10-37031

In the Matter of:

MYRON BAUMLER,
Claimant

v.

MARINETTE MARINE,
Employer

CRUM & FORSTER INSURANCE,
Carrier

SIGNAL MUTUAL/FRANK GATES ACCLAIM,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:[1]

H. Thomas Lenz, Esq.,
For the Claimant

Larry J. Peterson, Esq.
For the Employer and
Carrier Crum & Forster

Gregory P. Sujack, Esq.
For the Employer and
Carrier Signal Mutual

BEFORE: Robert L. Hillyard
Administrative Law Judge

---

[1] The Director, OWCP, was not represented at the hearing.

DECISION AND ORDER

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901, et seq. (Act), and the regulations issued thereunder, 20 C.F.R. §§ 702.101-704.451. A formal hearing was held in Green Bay, Wisconsin on March 21, 2002. By Order dated May 24, 2002, the record was held open until June 3, 2002 for the filing of briefs. The Claimant, the Employer, and the Carriers filed post-hearing briefs, which have been considered.

The findings and conclusions that follow are based on a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STIPULATIONS

The parties have stipulated, and I so find, as follows (JX 1; Tr. 12-14):[2]

1. Jurisdiction for these claims arises under the Longshore and Harborworkers' Compensation Act.

2. a. The Claimant filed a claim for compensation on February 26, 1998.

   b. The Claimant filed a claim for compensation on August 3, 2001.

3. The claims for compensation were timely filed.

4. a. The date of the alleged injury/accident is April 8, 1997.

   b. The date of the alleged injury/accident is May 22, 2001.

5. a. The April 8, 1997 accident/injury arose in the course and scope of employment.

   b. Whether the May 22, 2001 accident/injury arose in the course and scope of employment is disputed by Signal Mutual.

[2] Subsection (a) refers to Case No. 2001-LHC-3240; Subsection (b) refers to Case No. 2001-LHC-3241.

6. The Claimant and the Employer were in an employer/ employee relationship at the time of the alleged accidents.

7. a. The Employer was advised of or learned of the April 8, 1997 injury on April 8, 1997.

   b. The Employer was advised of or learned of the May 22, 2001 injury on May 22, 2001.

8. Timely notice of both injuries was given to the Employer.

9. a. The Notice of Controversion for the April 8, 1997 injury was filed on August 2, 2001.

   b. The Notice of Controversion for the May 22, 2001 injury was filed on August 13, 2001.

10. Notices of Controversion were timely filed for both injuries.

11. a. The Employer filed a First Report of Injury (Form LS-202) for the April 8, 1997 injury on January 7, 1998.

    b. The Employer filed a First Report of Injury (Form LS-202) for the May 22, 2001 injury on July 23, 2001.

12. An informal conference was conducted on August 22, 2001.

13. a. The Claimant's average weekly wage at the time of the April 8, 1997 incident was $511.60.

    b. The Claimant's average weekly wage at the time of the May 22, 2001 injury was $600.00.[3]

14. a. The Claimant briefly describes the nature and extent of his April 8, 1997 injury, as follows:

> Claimant suffered a work-related low back injury on April 8, 1997 requiring low back surgery in January, 1998. Although claimant eventually returned to work with permanent work restrictions, he

[3] At the hearing, Crum & Forster withdrew their objection to the average weekly wage for the May 22, 2001 injury, and the parties stipulated to $600.00 (Tr. 13).

continued to suffer from low back pain with radiation into his right leg. Claimant was reexamined by his treating physician in July, 2001 and advised that additional low back surgery was necessary to treat his ongoing symptoms.

b. The Claimant briefly describes the nature and extent of his May 22, 2001 injury, as follows:

Claimant suffered a work-related aggravation to the low back on May 22, 2001 when he raised his right foot six inches while operating a plate cutting machine at Marinette Marine Corporation. This incident necessitated additional treatment and eventually the need for additional surgery.

15. a. The Claimant suffered temporary total disability from January 12, 1998 through April 26, 1998, following the April 8, 1997 injury.

b. The Claimant suffered temporary total disability from July 17, 2001 through July 30, 2001, following the May 22, 2001 injury.

16. Benefits have been paid to the Claimant for the following disabilities:

a. Temporary total disability for the April 8, 1997, injury at the rate of $341.07 per week, totaling $5,116.02.

b. Temporary total disability at the rate of $400.00 per week, totaling $800.00 for the May 22, 2001 injury.

17. Crum & Forster Insurance paid medical benefits pursuant to Section 7 for medical treatment in 1998 - 1999. Medical bills for treatment in 2001 - 2002 remain unpaid, pending resolution of issues surrounding date of accident.

18. a. The Employer filed a Notice of Final Payment of Suspension of Compensation Payments (Form LS-208) for the April 8, 1997 injury on April 24, 1998.

b. The Employer filed a Notice of Final Payment of Suspension of Compensation Payments (Form LS-208) for the May 22, 2001 injury on August 22, 2001.

19. a. The Employer/Carrier claim relief for the April 8, 1997 injury under § 8(f) of the Act.

20. a. The basis for the Employer/Carrier's claim for relief for the April 8, 1997 injury under § 8(f) of the Act is:

> The Claimant had injuries to his neck, shoulder, right and left knees on April 4, 1975, December 15, 1975, June 19, 1978, July 9, 1982, April 6, 1990, May 29, 1990, April 8, 1997, August 28, 1997, June 30, 2000, and May 22, 2001; in addition, he has a pre-existing lumbar spine condition. If the employee is disabled over 104 weeks then that disability is due to these pre-existing permanent injuries and conditions.

II. ISSUES

The following issues are listed in the Joint Stipulations and Admissions (JX 1; Tr. 13-14):

1. Date of accident.[4]

2. Causation.

   a. The Employer and Signal Mutual dispute whether the May 22, 2001 accident/injury arose in the course and scope of employment.

3. Whether the Claimant's back incident at work on May 22, 2001 was a natural progression of his April 8, 1997 work-related back injury, or an aggravation, acceleration, or exacerbation of that back injury, to the extent that it forms the basis of a new inquiry.

[4] Although the date of the accident is listed as an issue at page 4 of the Joint Stipulations and Admissions, the parties stipulated at page 1 that the dates of the injuries/accidents are April 8, 1997 and May 22, 2001 (JX 1).

4. Whether the Claimant reached maximum medical improvement.[5]

5. Whether the Claimant returned to his regular employment with the Employer since the date of the injury.[6]

6. Past and future medical benefits pursuant to Section 7 of the LHWCA.

7. Temporary total disability compensation (TTD) for the period from 7/31/01 through 9/9/01, and future TTD compensation.

8. Entitlement to § 8(f) relief for the Carrier on the date of the accident.

9. Reasonableness and necessity of medical treatment.

10. Fees and litigation expenses for Claimant's counsel.

III. FINDINGS OF FACT

The Claimant, Myron Baumler (Claimant or Baumler), was born on October 8, 1942, and was 59 years old at the time of the hearing (Tr. 23).[7] He graduated from Stephenson High School in Stephenson, Michigan, and has received no formal schooling following high school (Tr. 24).

In 1964, Baumler began working as a ship fitter for the Employer, Marinette Marine (Marinette), in Marinette, Wisconsin (Tr. 24). He worked there until 1966, at which time he left to work on his father's farm (Tr. 25). He returned to Marinette in 1967 and was laid off in 1970, at which time he found employment with the Scott Paper Mill in Marinette, Wisconsin (Tr. 25). He was

---

[5] The issue of maximum medical improvement is disputed on the Joint Stipulations and Admissions (JX 1).

[6] The issue of whether the Claimant returned to his regular employment with the Employer since the date of the injury is noted as disputed on the Joint Stipulations and Admissions (JX 1).

[7] In this Decision, "CX" refers to the Claimant's Exhibits, "C&FX" refers to Crum & Forster's Exhibits, "SIGX" refers to Signal Mutual's Exhibits, "JX" refers to the Joint Stipulations of the Parties, "Tr." refers to the transcript of the March 21, 2002 hearing, "Claimant's Post-Hearing Brief" refers to the Written Closing Argument for Claimant, Myron L. Baumler, "Crum & Forster's Post-Hearing Brief" refers to the Employer/Crum & Forster's Post-Hearing Memorandum, and "Signal's Post-Hearing Brief" refers to the Post-Hearing Brief of the Employer and Signal Mutual.

laid off by the Scott Paper Mill and returned to Marinette in August 1972, where he was employed at the time of the March 21, 2002 hearing (Tr. 25). He testified that he did not suffer any injuries while working on the farm or at the Scott Paper Mill (Tr. 25).

While working for Marinette in the 1970's, Baumler suffered a broken finger, a leg injury caused by a flat bar falling on his leg, and several vertebrae pulls in his neck (Tr. 27-28). In 1990, he suffered a knee injury at Marinette caused by twisting his ankle when he stepped on an air hose on the deck of the boat where he was working (Tr. 29).

On April 8, 1997, while working for Marinette, the Claimant was assigned the job of forming side plates for the boat (Tr. 34). His duties included bending side plates, which were six to eight feet long, around the boat (Tr. 35). The plates which Baumler was working with that day weighed between two and three hundred pounds (Tr. 36). After forming the plate, the Claimant and a co-worker, Ralph Todzy, were attempting to lift the plate onto a pallet to be shipped outside (Tr. 36-37). While sliding the plate off of a pedestal, Todzy dropped his end, forcing Baumler to the floor, at which time he let go of the plate and it struck him across the top of his right foot (Tr. 37). He felt pain in his foot and a tear or pinching in his back at the belt line (Tr. 39). Baumler went to the Human Resources Department and reported his foot injury and the "twinge" feeling in his back (Tr. 40). A person at the Human Resources Department "iced down" his foot and asked if he wanted to see a doctor (Tr. 40). The Claimant said that he would try the ice on his foot and "see what happens" (Tr. 40). He remained at the Human Resources Department for about a half hour with the ice pack on his foot (Tr. 40). He then returned to work with the ice pack (Tr. 41). At the end of the work day, Baumler was feeling good except for a moderate pain in his foot (Tr. 41). Over time, he started to get lower back pain and a "hard, burning sensation" that fluctuated throughout his leg down to his ankle (Tr. 41-42). He continued to work, but stopped normal lifting (Tr. 42).

Later in 1997, Baumler suffered a knee injury, and was treated by Dr. Grace from August 28, 1997 through December 1, 1997 (Tr. 42). Dr. Grace performed surgery on his right knee on November 3, 1997 (Tr. 42-43, 44). The Claimant was off work for five weeks as a result of that injury (Tr. 43).

Dr. Grace referred Baumler to Dr. Ots, a Neurosurgeon, who performed surgery in January 1998 to alleviate the burning pain Baumler suffered in his leg (Tr. 43-44). The Claimant was off work for approximately four months as a result of the surgery (Tr. 44). When he returned to work at Marinette in April 1998, Dr. Ots gave him restrictions, including no stair climbing or continuous walking, and a fifty-pound limit for lifting (Tr. 46). As a result

of the restrictions, Baumler was given a new job in the tool crib at Marinette, where he worked for two to three months handing out tools to employees (Tr. 46). He was then assigned to the sheet metal shop where his duties included cutting angles in sheet metal (Tr. 47-48). After working in the sheet metal shop for seven to nine months, Baumler was re-assigned back to the plate shop (Tr. 49). Upon being re-assigned to the plate shop, he observed that Marinette had become more "safety-conscious" by requiring two men to lift anything over fifty pounds and assuring that all heavy lifting was done with cranes (Tr. 49).

On May 22, 2001, while working at the plate shop, Baumler was "rolling plate," which required him to stand and operate a plate rolling machine, which drives a piece of metal and presses it into a desired shape (Tr. 53). Todzy and Baumler were located on opposite sides of the machine (Tr. 54). When Baumler attempted to step onto the facing of the machine, which is five inches high, his back "locked up" and he was unable to put his right foot back down due to muscle pain in his back (Tr. 54-55). He stayed in that position for three to five minutes, when his pain was relieved and he was able to walk around (Tr. 55). Bill Getchell, the Safety Director, sent for an ambulance (Tr. 56). When the ambulance arrived, the pain had subsided so the Claimant refused to go to the hospital and continued to work for the rest of the day (Tr. 56).

Baumler sought treatment from Dr. Ots in July 2001 due to continued leg pain. He was unable to work more than an hour or two (Tr. 58). After an EMG, MRI, and back x-rays, Dr. Ots prescribed pain medication and advised the Claimant that the only procedure that would relieve the burning in his back would be to have his back "fused" (Tr. 58-60). Baumler was scheduled for back fusion surgery on August 3, 2001, but has yet to have the surgery because he was told that "workmen's comp. will not pay for it" (Tr. 60). Baumler returned to work in the plate shop on September 10, 2001, with Dr. Ots' instructions that he avoid stairs and maintain the fifty-pound weight restriction (Tr. 61). Since returning to work, he still experiences "burning" in his leg (Tr. 63).

Ralph Todzy

Ralph Todzy, a forty-year employee of Marinette, testified that he worked with Baumler in the plate shop "off and on for 20 some years, 25, 26" (Tr. 85). He said that he was working with Baumler on April 8, 1997, and witnessed the accident he had that day (Tr. 86). According to Todzy, he and Baumler were attempting to move a 200 to 250-pound piece of steel off of the pressing machine onto a pallet at which time the steel fell out of Todzy's hands onto the ground (Tr. 87-88). Todzy said that Baumler began jumping around and said that the top of his foot hurt and that he "felt his back go" (Tr. 88). Baumler went to the Human Resources department for first aid treatment and returned to work about 45

minutes later (Tr. 89). After Baumler's April 1997 injury, he had difficulty walking and carrying things and often complained of soreness and numbness in his leg (Tr. 91).

Todzy said that on May 22, 2001, while working with Baumler on opposite ends of the steel pressing machine, Baumler stepped up five inches onto the ledge, the "color was out of his face," and "he was in pain" (Tr. 93-94). Baumler remained in a stationary position for three to five minutes (Tr. 95). Mr. Getchell, the Safety Director, called the rescue squad, who conferred with Baumler (Tr. 95). Todzy has continued to work with Baumler since May 22, 2001 and described his condition as "a little bit worse with his back" (Tr. 96).

Melissa Seele

Melissa Seele, Steel Fabrication Foreman at Marinette, testified that she told Baumler not to go up steps if he had trouble walking stairs (Tr. 102). Ms. Seele stated that she was present on May 22, 2001 when Baumler's back "locked up" and it was obvious to her that he was in pain (Tr. 103). Ms. Seele can tell Baumler is in pain every day by the way he walks (Tr. 103). Ms. Seele said that in 1994, 1995, and 1996, she worked in the office at Marinette and observed Baumler's physical condition to be "normal," as compared to the year 2000, when she observed that he was limping and walking a little bit different, as if "his legs hurt or his back hurt" (Tr. 106).

Bill Getchell

Bill Getchell, Environmental Safety Manager at Marinette, testified that he was called to the plate shop on May 22, 2001 because someone was hurt. Mr. Getchell stated that he spoke with Baumler, who said that he was "okay," but Getchell called the rescue squad, who conferred with Baumler (Tr. 108-110).

IV. MEDICAL EVIDENCE

1. a. Dr. Richard A. Lemon, a Board-certified Orthopaedic Surgeon, examined the Claimant and issued a medical evaluation report dated March 13, 2002. Dr. Lemon reviewed the medical reports of Drs. Grace, Kaufman, Ots, Owens, Mack, Stein, and Yuska, as well MRI and EMG reports, dated from August 22, 1997 through March 4, 2002. He diagnosed: (1) Pre-existing multilevel degenerative disk disease and degenerative facet disease of the lumbar spine, unrelated to employment at Marinette Marine Corporation; (2) Degenerative herniated disk at L3-4 and L5-S1, unrelated to employment at Marinette Marine Corporation; (3) Manifestation of pre-existing multilevel degenerative disk disease and degenerative facet disease of the lumbar spine-May 22, 2001, unrelated to employment at Marinette Marine Corporation; and,

(4) Degenerative joint disease, both knees. Dr. Lemon opined that the Claimant's low back symptoms "are due to his preexisting multilevel degenerative disc disease and degenerative facet disease of the lumbar spine," and the Claimant "is not a candidate for surgery." He wrote that if the Claimant,

> ... elects to undergo a posterior laminectomy and fusion, this surgery is related only to Mr. Baumler's preexisting multilevel degenerative disc disease and degenerative facet disease of the lumbar spine and is unrelated to his employment at Marinette Marine Corporation and unrelated to his alleged on-the-job injuries of April 8, 1997 and May 22, 2001.

(SIGX 2).

b. Dr. Lemon was deposed on April 15, 2002, at which time he recounted the findings of his independent medical evaluation and stated that the Claimant "has bouts of low back pain due to degenerative arthritis of the lumbar spine. Specifically, he has degenerative disk disease at multiple levels and degenerative facet disease at multiple levels in his lumbar spine" (SIGX 4, pp. 9-10). Dr. Lemon opined that the Claimant's onset of low back symptoms on May 22, 2001 represented a "manifestation of his preexisting multilevel degenerative disk disease and degenerative facet disease of his lumbar spine" (SIGX 4, p. 10). According to Dr. Lemon, the incident of May 22, 2001 did not precipitate, aggravate, or exacerbate the Claimant's pre-existing degenerative condition (SIGX 4, p. 12). Dr. Lemon stated that his medical review reflected his belief that the incident in April 1997 was simply another manifestation of Mr. Baumler's symptoms of degeneration, because "no matter how much detail [the Claimant] described to me about that injury, if it's not backed up by the medical records, I have a hard time accepting a low back injury at that time the way he describes it, no matter how much detail he gives me" (SIGX 4, p. 20).

2. a. Dr. Kenneth H. Yuska, a Board-certified Orthopedic Surgeon, examined the Claimant on February 26, 2002 and in a report dated March 4, 2002, wrote that he reviewed "a thick medical record file," including treatment records, MRI reports, EMG testing, and operative notes dated from April 6, 1990 through August 6, 2001. Dr. Yuska opined that the Claimant had a pre-existing permanent condition in the cervical spine, shoulder girdle area, lumbar L5-S1 spondyloisthesis and right knee before 1997, and that "it is probable that these preexisting conditions affected the employee's employment activities." Dr. Yuska wrote that the Claimant's symptoms are not consistent with a new permanent aggravation of his pre-existing lumbar condition in his May 22, 2001 work injury. According to Dr. Yuska, the predominant injury was the Claimant's 1997 lumbar spine injury, resulting in lumbar disk surgery at L3-4.

He opined that the May 22, 2001 incident was a "minor aggravation." He apportioned twenty-five percent of the cost of medical treatment and wage loss since July 2001 to the May 22, 2001 injury, and seventy-five percent to the April 8, 1997 injury (C&FX 2, B-9).

b. Dr. Yuska was deposed on March 6, 2002, at which time he recounted the findings of his March 4, 2002 examination and report, and opined that, because of the longstanding nature of the Claimant's back pain and the fact that he is no longer responding to therapy, injections, or medications, "surgery is about all there is" to help his back pain (C&FX 4, D-1).

3. The record contains a medical chronology with a brief synopsis of the Claimant's symptoms and treatment from April 14, 1975 through August 28, 2001, as recorded by various providers, including: Bay Area Medical Center, Bellin Hospital, Dr. James Grace, Dr. Donald May, NE Wisconsin MRI Center, Neurology Consultants, Dr. Max Ots, Dr. James Tandias, and Dr. Lester Owens (C&FX 2, B-1).

4. An occupational health report, completed by Dr. Richard Stein on July 6, 2000, states that the Claimant complains of knee pain caused by twisting his left ankle and knee at work. Dr. Stein diagnosed a medial collateral ligament strain (C&FX 2, B-2).

5. Alan Bowman, PT, examined the Claimant on August 8, 2000, regarding his left knee injury and diagnosed left meniscectomy (C&FX 2, B-2).

6. Dr. Thomas Mack examined the Claimant on July 10, 2000, and July 17, 2000, and wrote that the Claimant suffered a twisting injury to his left knee on June 30, 2000. Dr. Mack wrote that the Claimant most likely has a little bit of a medial collateral ligament sprain (C&FX 2, B-2).

7. Kelly Parrson, P.A., of Bay Area Medical Center, wrote in an occupational health report dated August 22, 1997, that the Claimant complained that he had surgeries to his right knee in 1990, and was in chronic pain that is getting worse. It may be irritated at work but it is not a new injury from work (C&FX 2, B-2).

8. a. Dr. David Kaufman conducted a neurologic evaluation of the Claimant and, in a letter to Dr. Grace on November 25, 1997, wrote that the Claimant's symptoms included pain, numbness, and burning in his right anterior thigh, following an injury at work in August 1997. He opined that the Claimant's symptoms are consistent with meralgia paresthetica, but noted that he could not document sensory loss in the distribution of the lateral femoral cutaneous nerve, as is usually the case. Dr. Kaufman wrote it is possible

this is an L3 radiculopathy related to the Claimant's injury at work in August (CX 3, C1).

b. Dr. Kaufman conducted an electromyography (EMG), which he determined was essentially normal, and wrote that the prolonged sural sensory peak latency may suggest the presence of a mild underlying peripheral neuropathy (CX 3, C2).

c. Dr. W. Hingtgen, in a MRI examination report to Dr. Kaufman dated December 1, 1997, opined that the Claimant suffered from "L5 spondylolysis associated with mild spondylollsthesis." He wrote that the findings are consistent with a "focal right lateral disc protrusion at the L3-4 level" (CX 3, C3).

d. Dr. Kaufman, in a letter to Dr. Grace dated December 3, 1997, wrote that he reviewed the MRI of the lumbosacral spine and found a lateral disk herniation at the L3-4 interspace with slight displacement of the L3 nerve root. He said the Claimant also has right L5-S1 foraminal stenosis secondary to spondylosis and a moderate posterior right lateral disk protrusion and facet hypertrophy (CX 3, C4).

e. Dr. Kaufman performed an EMG of the right lower extremity on December 30, 1998, which he found to be normal. He opined that there is no electrophysiologic evidence for a lumbar or sacral radiculopathy on the right, no evidence of an L3 radiculopathy, and no abnormalities were found in the L5 distribution (CX 3, C5).

9. The record contains a series of reports from Dr. Max E. Ots regarding his treatment of the Claimant, including:

a. In a letter from Dr. Ots to Dr. James Grace, dated January 2, 1998, Dr. Ots wrote that he examined the Claimant on January 2, 1998, and the Claimant complained of "low back, right buttock and anterior thigh pain and numbness." The onset of the Claimant's pain was June 1997, his primary injury occurred in April 1997, and his pain is aggravated by standing and walking. Dr. Ots diagnosed "right lower extremity pain consistent with an L3 radiculopathy" and recommended microlumbar discectomy surgery (CX 1, A3).

b. Dr. Ots examined the Miner on January 13, 1998 at Bellin Memorial Hospital regarding low back and right lower extremity pain into the anterior thigh with numbness. He diagnosed right lower extremity pain consistent with L3 radiculopathy. He admitted the Claimant for microlumbar diskectomy (CX 4, D2). Dr. Ots performed a right L3 partial laminotomy with partial facetectomy and excisional lateral L3 disk protrusion on January 13, 1998 (CX 4, D2). Dr. R.J. Monette provided a

radiologic consultation to Dr. Ots on January 13, 1998 and August 7, 1998, in which he diagnosed a Grade I spondyloisthesis of L5 upon S1 and disk space narrowing at L34 and L5-S1 (CX 4, D3, D6). Dr. Ots discharged the Claimant on January 15, 1998. He diagnosed a right L3 lateral disk herniation (CX 4, D4).

c. Office visit notes from February 9, 1998 through July 16, 2001, describe his evaluation and treatment of the Claimant's low back and right leg pain consistent with an L3 radiculopathy (CX 1, A4-A17).

d. In an office note dated July 24, 2001, Dr. Ots wrote that the Claimant "has never done well following his last surgery and I think that the alternative at this point would be to proceed with a posterior decompression and fusion." Dr. Ots wrote that the Claimant "has not done well and has continued to have pain ever since he had his surgery in 1998." He opined that the Claimant is disabled by these symptoms and that surgery is reasonable (CX 1, A20).

e. In a letter to Attorney Larry Peterson dated August 6, 2001, Dr. Ots wrote that the Claimant has been under his care for low back and right lower extremity pain, and underwent microdiskectomy for lateral disk herniation at L3-4 in 1998, due to a work-related back injury. Dr. Ots stated that the Claimant "did not improve as much as he was expected" and "never did recover." Dr. Ots responded to a September 1998 letter from Dr. Owens in which Dr. Owens stated that the Claimant's pain is related to a progressive degeneration condition due to his pre-existing L5-S1 spondylolisthesis. Dr. Ots wrote that while he did not doubt that the Claimant's L5-S1 spondylolisthesis is a degenerative condition and also pre-existing to his injury, the Claimant's "pain is not related to that condition" because "his pain is an L3 root distribution, not an L5 root distribution." According to Dr. Ots, "this has been well documented with an EMG, which is an objective test" (CX 1, A21).

f. Dr. Henry K. Feider wrote, in an MRI examination report to Dr. Ots dated July 19, 2001, that the Claimant's symptoms of right anterior thigh pain, right leg numbness, and lower back pain had not improved since his last surgery. Dr. Feider concluded that the Claimant has "moderate degenerative disk disease including some disc space narrowing" (CX 1, A19).

g. A series of Return to Work Recommendation Forms completed by Dr. Ots, dated January 2, 1997 through April 21, 1999, all of which recommend that the Claimant be restricted to medium work (CX 2, B1-B6, B8-B10).

h. Dr. Ots was deposed on February 25, 2002, at which time he recounted the findings of his examinations of the Claimant.

Dr. Ots said that the Claimant's back pain and radicular symptoms resulted from an April 1997 injury at work which caused a herniated disk (CX 7, p. 9). He stated that the May 22, 2001 injury was aggravated by the condition that resulted from the April 1997 injury (CX 7, p. 38).

10. a. Dr. James Grace wrote, in a December 29, 1997 letter to Dr. Ots, that the Claimant had an MRI scan which demonstrates a right focal lateral disk herniation at the L3-4 level (CX 5, E1).

b. Treatment notes from Dr. Grace dated August 29, 1997 through November 13, 1997 diagnose persistent right medial knee pain and state that the Claimant underwent an arthroscopic debridement of the right knee on November 3, 1997 (CX 5, E2).

11. Julie Conley, PT, conducted a physical therapy initial evaluation on March 3, 1998, and noted that the Claimant complains of right lower back and anterior thigh pain. He reports an onset of symptoms in the early part of April 1997 when he was moving an object with his partner who dropped his end and, thus, he had to drop his end with symptoms onset thereafter. Conley wrote that the Claimant reports intermittent pain, tingling, and numbness in the right hip and anterior thigh to knee level. Conley found that Baumler suffered from painful mobility with lumbar flexion and right side bending and rotation, and lumbar segmental hypomobility (C&FX 2, B-2). Physical therapy weekly progress notes dated March 9, 1998 through April 15, 1998 state that the Claimant continues to have tingling and numbness down the anterior thigh to the knee, and a burning sensation just distal medial malleolus (C&FX 2, B-2).

12. Dr. Lester Owens, in a report dated August 10, 1998, wrote that based upon physical examination, review of medical records, documents, radiological imaging studies and diagnostic studies dated from 1997-1998, and a history given by the Claimant, Baumler suffers from a "persistent sensory disturbance in the right L3 nerve root distribution with loss of sensation over the anterior thigh. Based on the review of records, it is assumed that the L3-4 disk herniation is a result of his April 8, 1997 work-related incident." Dr. Owens opined that the Claimant is capable of working in a medium duty capacity but did demonstrate some significant physical impairment with stair climbing. He conducted a functional capacities assessment and opined that the Claimant can occasionally lift 41.3 pounds and frequently lift 22 pounds and continuously lift 5.5 pounds. Dr. Owens opined that the Claimant should not attempt stair climbing and can occasionally to frequently crawl, kneel, and twist. Dr. Owens said he "would be cautious in placing [the Claimant] in high unprotected work" (C&FX 2, B-5).

13. Dr. Patrick M. Carrigan, in an MRI Examination Report dated August 7, 1998, concluded "right posterolateral disc protrusion likely compromising the exiting L5 nerve root. This is accentuated somewhat by spondylolisthesis and facet degenerative change" (CX 2, B7).

14. A Functional Capacity Assessment was conducted by The Health Center on August 10, 1998. The report states that the Claimant's job of Machine Operator requires that he be able to continuously lift up to 150 pounds. Because the study revealed that the Claimant could continuously lift only 5.5 pounds, it was concluded that the Claimant's performance on the Functional Capacity Assessment would not be comparable to the lifting requirements of his job (C&FX 2, B-6).

15. a. The record contains examination reports and an operative report from Dr. James Tandias, dated from April 16, 1990 through February 11, 1991. Dr. Tandias wrote that the Claimant "stepped on an air hose and twisted his right ankle medially, since then he has noted right knee pain." He diagnosed a posterior horn tear, right medial meniscus and performed an arthroscopy, resection of posterior horn tear, right medial mensicus, and shaving of the medial femoral condyle on April 17, 1990 (C&FX 2, B-2, B-3).

b. In a medical report dated April 17, 1990, Dr. Tandias wrote that the Claimant stepped on an air hose on April 6, 1990, injuring his right knee. According to Dr. Tandias, the Claimant had pain since then and denied any previous problems with the same knee. Dr. Tandias diagnosed a "locked knee, probably secondary to a medial meniscus tear" and recommended arthroscopy.

c. Dr. Tandias wrote, in an operative report dated April 17, 1990, that he performed an arthroscopy, resection of posterior horn tear, right medial meniscus, and shaving of medial femoral condyle.

16. The record contains the following five treatment notes from Dr. Donald May, a chiropractor, dated between April 14, 1975 and June 5, 1999 (C&FX 2, B-4):

a. In a report dated April 14, 1975, Dr. May wrote that the Claimant suffered an "acute strain of the shoulder girdle region including the lower cervical area," caused when he and a co-worker were lifting a Kelley Plate and the co-worker dropped his end of it.

b. In a report dated December 23, 1975, Dr. May wrote that the Claimant suffered an "acute strain of lower cervical and upper thoracic area with subluxation of D7 and D8 vertebrae" while "lifting at work." According to Dr. May, the Claimant suffered a previous injury on April 4, 1975 of the same area.

c. In a report dated October 25, 1977, Dr. May wrote that the Claimant injured his left shoulder and neck when he "was picking up a steel pillar with another worker and the other worker couldn't hold his end."

d. On July 23, 1982, Dr. May wrote that the Claimant injured his neck and left shoulder on July 9, 1982, when "he was taking top die out of the break and it slipped, tried catching it in left arm. Felt pain in neck and left shoulder." He diagnosed cervical strain - left side and shoulder pain.

e. On June 5, 1990, Dr. May wrote that the Claimant injured himself on May 29, 1990 when "he was running a crane, holding on to the end of a load, it tipped and lifted him off the floor." He diagnosed whiplash.

V. CONCLUSIONS OF LAW

Causation

The parties stipulated that the April 8, 1997 injury/accident arose in the course and scope of employment (JX 1). Baumler, the Director, and Crum & Forster stipulated that the May 22, 2001 injury arose in the course and scope of employment (JX 1). Marinette and Signal Mutual (Signal) dispute whether the May 22, 2001 injury arose in the course and scope of employment (Tr. 12).

In Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989), the Board held that the presumption that an employee's injury arose out of employment, pursuant to § 20(a), applies to the issue of whether an injury is causally related to employment. Where an employment-related injury aggravates, combines with, or accelerates a pre-existing condition, the entire resultant condition is compensable. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); Laplante v. General Dynamics Corp./Elec. Boat Div., 15 BRBS 83 (1982). In order for the § 20(a) presumption to apply, the claimant must establish a prima facie case. To establish a prima facie case, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that:

(1) The claimant sustained physical harm or pain; and,

(2) An accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain.

Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). Once the prima facie case is established, a presumption is created under § 20(a) that the employee's injury arose out of the employment. In Sinclair the Board held that the claimant need not affirmatively prove causation. Once the claimant establishes the elements of a

prima facie case, i.e., the existence of physical harm and working conditions which could have caused such harm, the presumption provides the causal nexus. Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989). The burden then shifts to the employer to establish that the claimant's condition was not caused or aggravated by the employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

At the formal hearing, Baumler testified that on May 22, 2001, he was "rolling plate" in the plate shop, which required him to stand and operate a machine that drives a piece of metal and presses it into a desired shape (Tr. 53). The Claimant and Ralph Todzy were working on opposite sides of the machine (Tr. 54). When he attempted to step onto the facing of the machine, which is five inches high, his back "locked up" and he was unable to put his foot back down, due to muscle pain in his back (Tr. 54-55). He stayed in that position for three to five minutes, when his pain was relieved, and he was able to walk around (Tr. 55). Ralph Todzy testified to the same facts, stating that when the Claimant stepped up five inches onto the ledge, the "color was out of his face" and "he was in pain" (Tr. 93-94). Melissa Seele, Steel Fabrication Foreman at Marinette, testified that she was present on May 22, 2001 when Baumler's back "locked up," the rescue squad was called and it was obvious to her that he was in pain (Tr. 103). Additionally, Bill Getchell, Environmental Safety Manager at Marinette, testified that he was called to the plate shop on May 22, 2001, because someone was hurt. Getchell spoke with Baumler, who said he was "okay," but Getchell called the rescue squad (Tr. 108-110). I find the Claimant, Ralph Todzy, Melissa Seele, and Bill Getchell all credible witnesses. Based upon their testimonies, I find that the Claimant has established that: (1) Physical harm or pain occurred when he experienced back pain; and, (2) Conditions existed at work which could have caused the harm or pain. Because he established both elements set out in Kier v. Bethlehem Steel Corp., supra, I find that the Claimant has established a prima facie case. Therefore, the presumption under § 20(a) applies to form a causal nexus between the injury and the Claimant's employment. The burden now shifts to the Employer to establish that the Claimant's condition was not caused or aggravated by the employment.

Marinette and Signal contend that the Claimant's current condition is not related to the May 22, 2001 incident. They argue that the testimony of Drs. Ots and Lemon "serve as substantial evidence to rebut the presumption [that the Claimant's May 22, 2001 injury arose out of his employment]" (Signal's Post-Hearing Brief, p. 6). According to Marinette and Signal, the Claimant has a degenerative condition, which existed both before and after the May 2001 incident as noted by Dr. Ots (Signal's Post-Hearing Brief, p. 7). They argue that while Dr. Lemon disagrees with Dr. Ots'

recommendation for surgery, both physicians agree that the May 2001 incident "was not an aggravating, accelerating, or precipitating event" (Signal's Post-Hearing Brief, p. 6). The Claimant argues that the opinions of Drs. Ots and Yuska support his claim that the May 22, 2001 injury aggravated the injury suffered on April 8, 1997 (Claimant's Post-Hearing Brief, p. 7). Specifically, the Claimant notes that Dr. Ots testified that Baumler's reaction to stepping onto the ledge on May 22, 2001 did "participate" in the deterioration of the Claimant's condition that Dr. Ots observed in his July 2001 examination (Claimant's Post-Hearing Brief, p. 7, citing CX 7, p. 37). In his February 25, 2002 deposition, Dr. Ots testified:

> Q: But he did make a point of telling you that his symptoms substantially changed all at once while at work doing this activity on May 22, 2001, didn't he?
>
> A: I agree.
>
> Q: And don't you think that activity becomes a participant in the cause of the need for surgery now, where he didn't need it two years ago?
>
> A: I think it becomes a participant. The problem is that the problem he had before and the surgery that he had for that, does, by taking a part of that facet joint and doing the surgery that you were going to do, does predispose you to have more problems. So even if you had like no problems whatsoever, no pain whatsoever after that operation, you're perfectly fine, have no injury whatsoever, I mean the fact you've had that injury to some extent would predispose you to have further problems.
>
> Q: But in this case apparently he was doing okay at work, symptomology-wise, throughout the rest of '99, 2000, and into 2001, didn't see anyone, and in fact the year before when he had his knee injury he said his back - - didn't even have back pain or numbness into his legs, doesn't an incident on May 22nd then, 2001, become also one of the causes to aggravate that preexisting condition?
>
> A: I agree.

(CX 7, pp. 37-38).

In his March 6, 2002 deposition, Dr. Yuska testified that the Claimant's return to "heavy work" after his 1997 surgery, including

"this episode where he stepped up," was "certainly a part of his increase in symptoms and that's what aggravated his problem" (C&FX 4, pp. 15-16). Dr. Yuska's testimony is consistent, as the Claimant's argues, with Dr. Ots' opinion that the May 22, 2001 incident aggravated the injury previously suffered by the Claimant in April 1997.

Dr. Lemon testified in his April 15, 2002 deposition: "I believe that Mr. Baumler's onset of low back symptoms by simply stepping up on May 22nd, 2001 represented a manifestation of his preexisting multilevel degenerative disk disease and degenerative facet disease of his lumbar spine" (SIGX 4, p. 10). Dr. Lemon said that the May 22, 2001 incident did not aggravate, accelerate, or exacerbate the pre-existing degenerative disk disease suffered by the Claimant (SIGX 4, p. 12). The Claimant argues that Dr. Lemon's opinion is based on his belief that the Claimant never suffered a work-related injury in April 1997 (Claimant's Post-Hearing Brief, p. 7). Dr. Lemon testified that the Claimant told him that he injured his low back in April 1997 on the job (SIGX 4, p. 8). However, this is the only mention of the April 1997 injury by Dr. Lemon, and he diagnosed the Claimant as suffering from "degenerative disk disease at multiple levels and degenerative facet disease at multiple levels in his lumbar spine" (SIGX 4, p. 10). Dr. Lemon noted that degeneration, the wear and tear related to the aging process, is accelerated in some individuals by heredity or familial factors. He opined that the condition of Mr. Baumler's spine was consistent with the amount of degeneration that one might find in the average fifty-nine year old (SIGX 4, pp. 11-12).

In Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990), the Board affirmed the Judge's finding that an accident occurred at work, where a claimant notified her instructor and various physicians of the accident's occurrence. The Board found that the § 20(a) presumption was properly applied, and that the Administrative Law Judge acted within his discretion as the trier-of-fact in discrediting a physician's opinion that the claimant's condition was not work related, because the doctor assumed that the claimant suffered no work-related accident. Although Dr. Lemon attributed the Claimant's May 22, 2001 pain to degenerative disk disease, he found the level of degeneration suffered by the Claimant to be average for his age. I find that Dr. Lemon's opinion is entitled to less weight because he does not discuss how the Claimant's April 1997 injury affected his current condition. Furthermore, he does not acknowledge that the Claimant suffered an injury on May 22, 2001, which is uncontested. Due to his failure to discuss the reasons for his conclusions and reference the data upon which he relied in making his diagnosis, I find that Dr. Lemon's opinion is outweighed by the better reasoned and documented opinions of Drs. Ots and Yuska. The Judge is not bound to accept the opinion or theory of any particular medical examiner.

A Judge is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962); Ennis v. O'Hearne, 223 F.2d 755 (4th Cir. 1955). It is solely within the Judge's discretion to accept or reject all or any part of any testimony, according to his judgment. Perini Corp. v. Hyde, 306 F.Supp. 1321, 1327 (D.R.I. 1969).

Based upon the foregoing, I find that the opinions of Drs. Yuska and Ots support the application of the presumption under § 20(a) of the Act that the Claimant's May 22, 2001 injury arose out of employment. I find that the opinions of Drs. Ots and Lemon fail to rebut the presumption. I find that both the April 8, 1997 and May 22, 2001 injuries arose out of the Claimant's employment.

Natural Progression or Aggravation

The Claimant was injured while working at Marinette on April 8, 1997, when a side plate, weighing two to three hundred pounds, was dropped on his foot (Tr. 36-37). Over time, the Claimant had lower back pain and a "hard, burning sensation" that fluctuated throughout his leg down to his ankle (Tr. 41-42). Dr. Ots, a Neurosurgeon, performed surgery in January 1998 to alleviate the burning pain in the Claimant's leg (Tr. 43-44). The Claimant was off work for four months as a result of that surgery (Tr. 44). He returned to work in April 1998 and worked in the tool crib for two to three months, then in the sheet metal shop for seven to nine months, before being re-assigned to the plate shop. On May 22, 2001, while operating a plate-rolling machine, his back "locked up," and he experienced muscle pain in his back (Tr. 54-55). The cramping or locking sensation continued for about fifteen minutes but finally subsided, and the Claimant continued working (Tr. 56). He experienced continued leg pain and sought treatment from Dr. Ots in July 2001. At that point, he was unable to work more than an hour or two, due to his leg pain (Tr. 58). Dr. Ots prescribed pain medication and advised the Claimant to undergo back fusion surgery (Tr. 58-60). Baumler returned to work in the plate shop on September 10, 2001, with Dr. Ots' instructions that he avoid stairs and maintain a fifty-pound weight restriction (Tr. 61). He still experiences "burning" in his leg (Tr. 63).

The Claimant argues that the injury on May 22, 2001 "contributed to, combined with or aggravated claimant's well known and preexisting low back pain, adding to his disability" (Tr. 18-19; Claimant's Post-Hearing Brief, p. 8). Because Signal provided workers' compensation insurance for the Employer on that date, the Claimant argues that financial liability should be assessed against Signal (Claimant's Post-Hearing Brief, p. 8). Signal argues that the Claimant "did not suffer any injury to his low back in May, 2001." According to Signal, the Claimant's condition is not the result of any events that occurred while working for the employer

in May 2001 because: (1) the Claimant's "cramp in his back was well above the situs of his original back pain;" (2) the Claimant did not seek immediate care or treatment; and, (3) there was a two-month gap between the May 2001 incident and the July 2001 treatment with Dr. Ots. The Employer and Signal argue that the Claimant had a pre-existing degenerative condition (Tr. 21-22; Signal's Post-Hearing Brief, pp. 6-7).

Crum & Forster argues that the May 2001 injury constituted an aggravation of a pre-existing injury and the EMG and MRI administered after May 2001 were positive for "an L3-4 disc with radiating pain into the right leg" (Tr. 21).

If the disability results from the natural progression of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for which the claimant was working when he was first injured. However, if the second injury aggravates the claimant's prior injury, thus further disabling the claimant, the second injury is the compensable injury, and liability therefor must be assumed by the employer or carrier for whom the claimant was working when "reinjured." Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g 15 BRBS 386 (1983); Abbott v. Dillingham Marine and Mfg. Co., 14 BRBS 453 (1981). When a claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensable purposes. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. Wheatly v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

Dr. Lemon is the only physician to opine that the pain experienced by the Claimant on May 22, 2001 was merely a "manifestation of his preexisting multilevel degenerative disk disease and degenerative facet disease of his lumbar spine" (SIGX 4, p. 10). He testified that the degree of degeneration is average for the Claimant's age, and is solely responsible for his back pain (SIGX 4, pp. 11-12). In contrast, Dr. Ots, the Claimant's treating physician, and Dr. Yuska, found that the May 22, 2001 incident aggravated the Claimant's April 1997 injury. The record contains numerous treatment notes from Dr. Ots, dated from 1997 through 2002, as well as MRI reports, and the results of his examinations of the Claimant. Dr. Ots gave the reasoning for his conclusions and referred to the data upon which he relied in making his diagnosis. I find his opinion is reasoned, documented, and entitled to substantial weight. Dr. Yuska examined the Claimant in February 2002 and reviewed what he described as "a thick medical record file," including treatment records, MRI reports, EMG testing, and operative notes dated from April 6, 1990

through August 6, 2001. He opined that the predominant injury was the Claimant's 1997 lumbar spine injury and the May 22, 2001 incident was a "minor aggravation" of that injury (C&FX 2, B-9). He conducted an examination and reviewed over 10 years of medical history. Additionally, Dr. Yuska gave reasons for his conclusions, and referred to the data upon which he relied in making his diagnosis. As such, I find his opinion is entitled to substantial weight. Dr. Lemon's report is not as well reasoned or documented because he gives no reasoning for his diagnosis of degenerative disk disease other than the Claimant's age, and does not discuss why the Claimant's April 1997 injury is not significant in his current condition. For the reasons stated, I accord more weight to the opinions of Drs. Ots and Yuska, and find that the Claimant's May 22, 2001 injury was an aggravation of his April 8, 1997 injury, not a natural progression of that injury. Therefore, Signal Mutual, the Carrier at the time of the May 22, 2001 injury, is the responsible carrier.

Maximum Medical Improvement

The parties stipulated that the Claimant received temporary total disability for the April 8, 1997 injury for fifteen weeks, and temporary total disability for the May 22, 2001 injury for two weeks (JX 1). In the Joint Stipulations and Admissions (JX 1), an unidentified party wrote that the issue of whether the Claimant has reached maximum medical improvement is disputed.[8] Handwritten beside this issue, at page 3, is the notation:

For the 4/8/97 injury - 8/10/98 or April 21, 1999.

In the Employer and Crum & Forster's Post-Hearing Brief, they note that Crum & Forster obtained an independent medical examination on August 10, 1998 by Dr. Owens (C&FX 2, B-5, B-6, pp. 117-133). They also argue that Dr. Ots "dismissed the claimant from medical treatment following the April 21, 1999 office visit" (CX 1, A-16, p. 23). Because the dates of August 10, 1998 and April 21, 1999 are the same dates used in Crum & Forster's Post-Hearing Brief, I will presume that Crum & Forster argue that maximum medical improvement was reached on either August 10, 1998 or April 21, 1999.

A residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988); Trask v. Lockheed Shipbuilding

[8] No dispute is noted regarding maximum medical improvement for the May 22, 2001 injury, and Signal Mutual does not address this issue in their brief.

& Constr. Co., 17 BRBS 56, 60 (1985). Only payments by employers made for permanent disability are credited against the 104-week obligation, for purposes of contribution by the Special Fund, under § 8(f) of the LHWCA. See 33 U.S.C. § 908(f). Where the treating physician stated that surgery might be necessary in the future and that the claimant should be re-evaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude that the claimant's condition was temporary rather than permanent. Dorsey v. Cooper Stevedoring Co., 18 BRBS 25, 32 (1986), pet. dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP, 826 F.2d 1011 (11th Cir. 1987). Where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. Kuhn v. Associated Press, 16 BRBS 46, 48 (1983).

In his August 10, 1998 report, Dr. Owens did not opine that the Claimant reached maximum medical improvement (C&FX 2, B-5). Likewise, Dr. Ots' April 21, 1999 report does not state that the Claimant has reached maximum medical improvement (CX 1, A-16). Although Dr. Ots wrote that he "[does] not want to proceed with any further investigation unless his symptoms would progress," this is not tantamount to a finding of maximum medical improvement, but rather to Dr. Ots' desire to re-evaluate the Claimant's condition in the future. I find that the Claimant has not reached maximum medical improvement as of August 10, 1998 or April 21, 1999. Additionally, I find that the Claimant has not reached maximum medical improvement, based on Dr. Ots' July 16, 2001 examination report, in which he opined that the Claimant has an active L3 radiculopathy and recommended that the Claimant undergo a posterior decompression and fusion at L3-4 (CX 7, p. 24).

Return to Regular Employment Since the Date of the Injury

The parties stipulated that the Claimant returned to work with physical restrictions on April 27, 1998 and continued such employment through July 17, 2001. The parties further stipulated that the Claimant returned to work with physical restrictions on September 10, 2001, and his employment continues to date (JX 1). An unidentified party wrote, beside this issue:

> Disputed - after April 8, 1999 returned to regular work in late 1999.

The Claimant testified that when he returned to work in 1998, he was placed on restrictions, including no climbing stairs, no continuous walking, and a fifty-pound lifting limit (Tr. 46). He testified that he worked in the tool crib for two to three months, and then worked in the sheet metal shop for seven to nine months (Tr. 46-48). According to the Claimant, Marinette continued to observe the restrictions (Tr. 47). According to the Claimant, although he went back to work in the plate shop in late 1999,

conditions at the plate shop had changed, such that there was no more heavy lifting required of the employees (Tr. 49). Ralph Todzy also testified that the lifting limits at the plate shop decreased, and a crane was used more often after the April 8, 1997 incident (Tr. 92). Based upon the testimony of the Claimant and Todzy, I find that the Claimant returned to work with physical restrictions, and has not returned to "regular work," with the heavy-lifting requirements that existed prior to the April 8, 1997 injury.

Past and Future Medical Benefits Pursuant to Section 7

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §§ 907(a). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A Judge has no authority to deny a medical expense on the ground that a physician's expertise, customary fees, or result of treatment were not documented. Turner, 16 BRBS at 257. The employer is only liable, however, for the reasonable value of medical services. See 20 C.F.R. § 702.413; Bulone v. Universal Terminal & Stevedoring Corp., 8 BRBS 515, 518 (1978); Potenza v. United Terminals, Inc., 1 BRBS 150 (1974), aff'd 524 F.2d 1136, 3 BRBS 51 (2nd Cir. 1975).

Before it can be determined whether the medical costs and proposed back fusion surgery are reasonable and necessary medical expenses, it must first be determined whether the Claimant's physical problems are causally related to the work-related accident on April 8, 1997 and the injuries sustained thereafter on May 22, 2001.

Whether the Claimant's Physical Problems are Causally Related to the April 8, 1997 Accident and May 22, 2001 Injuries

The Claimant testified that he continues to experience the radiating leg pain that limits his walking and carrying both at work and at home (Tr. 62). It is solely within the Judge's discretion to accept or reject all or any part of any testimony. Perini Corp. v. Hyde, 306 F.Supp. 1321, 1327 (D.R.I. 1969). The Judge has discretion to accept all of the Claimant's assertions, or accept those that he considers to be substantiated by other

evidence.[9] I find that the Claimant is a credible witness, and find that his testimony at the formal hearing regarding his symptoms and pain is credible.

Dr. Ots examined the Claimant on July 16, 2001, and ordered an MRI and EMG. Upon review of the test results, he noted that the EMG demonstrated evidence of an active L3 radiculopathy on the right, and recommended on July 24, 2001 that the Claimant undergo a posterior decompression and fusion at L3-4 (CX 7, p. 24). The Claimant testified that, if financially allowed to consult with Dr. Ots again, he "would undergo the treatment prescribed by Dr. Ots in July 2001 if it remained the only hope to regaining his pre-injury quality of life" (Tr. 62).

Marinette and Signal argue that the Claimant's condition is not the result of events that occurred while working for Marinette in May 2001, and that they are not liable for any disability incurred, and should be reimbursed for the amounts that the Carrier paid out in disability compensation. They argue that the Claimant has "a pre-existing degenerative condition" which "in no way aggravated, accelerated or precipitated any need for further care or treatment" (Signal's Post-Hearing Brief, p. 7). They base their argument that the Claimant has a degenerative condition on the diagnosis of Dr. Lemon, a Board-certified Orthopaedic Surgeon, who examined Baumler on March 13, 2002. Dr. Lemon opined that the Claimant has a "pre-existing degenerative condition" which "in no way aggravated, accelerated or precipitated any need for further care or treatment" (Signal's Post-Hearing Brief, p. 7). Marinette and Signal also argue that Dr. Ots "has testified that the Claimant's treatment was for the on-going degenerative condition," and that the Claimant's supervisor, Ms. Seele, "demonstrated that the claimant had been limping for some time. Further, the incident of May 2001 had no effect on his limp" (Signal's Post-Hearing Brief, p. 6).

In response, the Claimant argues that Dr. Lemon lists the Claimant's age as being a contributing factor to his declining physical condition, yet neglects to mention his overall good health and lack of low back pain prior to April 1997. The Claimant notes that Dr. Lemon listed "familial factors" as contributing to the Claimant's back pain, and testified that the April 1997 accident did not alter the progress of his alleged degenerative disk disease. According to the Claimant, Dr. Lemon did not obtain a

---

[9] The Board will not interfere with credibility determinations made by an Administrative Law Judge unless they are "inherently incredible and patently unreasonable." Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1335, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); Phillips v. California Stevedore & Ballast Co., 9 BRBS 13 (1978).

family history, and did not inquire as to the weight of the object the Claimant attempted to hold or the Claimant's body position at the time of the April 1997 injury (Claimant's Post-Hearing Brief, p. 8; SIGX 2). Further, the Claimant notes that "[b]oth Drs. Ots and Yuska agree that claimant suffered an injury as defined by Section 2(2) of LHWCA on April 8, 1997" (Claimant's Post-Hearing Brief, p. 7). The Claimant argues that Dr. Lemon's opinion that the events of May 22, 2001 did not combine with, aggravate, or accelerate the Claimant's low back condition is based on Dr. Lemon's belief that the Claimant never suffered a work-related injury.

Signal's argument that the Claimant's physical problems are unrelated to the April 8, 1997 and May 22, 2001 injuries is not supported by the testimony of Dr. Ots or Melissa Seele. Seele testified that she was present on May 22, 2001, when Baumler's back "locked up," and that it was obvious to her that he was in pain, and is in pain every day, by the way he walks (Tr. 103). In his February 25, 2002 deposition, Dr. Ots opined that the May 22, 2001 injury was aggravated by the back pain and herniated disk suffered by the Claimant in his April 1997 injury at work (CX 7, p. 9, 38).

Based upon the testimony of the Claimant, Seele, and Dr. Ots, I find that the evidence does not support Signal's claim that the testimony of Seele and Dr. Ots establishes that the Claimant's physical problems are not causally related to the April 8, 1997 accident and the injuries sustained on May 22, 2001.

As noted by the Claimant, Dr. Lemon did not report the Claimant's family medical history in his opinion and deposition testimony (SIGX 2, 4). Additionally, Dr. Lemon did not inquire as to the weight of the object the Claimant attempted to hold, or the Claimant's body position, at the time of the April 1997 injury (SIGX 2, 4). Based upon a review of the reports by Dr. Lemon and Dr. Ots, I find that Dr. Lemon is not as familiar with the Claimant's physical condition and history as Dr. Ots, who is the Claimant's treating physician. Additionally, Dr. Ots' opinion is better reasoned and documented. As such, I accord greater weight to Dr. Ots' opinion, and find that the Claimant's physical problems are causally related to the April 8, 1997 accident and the injuries sustained on May 22, 2001.

When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act, a treating physician's opinion is entitled to "special" weight. Amos v. Director, Office of Workers' Compensation Programs, 153 F.3d 1051 (9th Cir. 1998); See also, American Stevedoring Ltd. v. Marinelli, 248 F.3d 54 (2nd Cir. 2001); Longshore and Harbor Workers' Compensation Act, §§ 1, et seq. Generally, the Administrative Law Judge is entitled to give greater weight to the opinion of a treating physician than to that of nontreating physicians. Morehead Marine Services, Inc. v. Washnock,

135 F.3d 366 (6th Cir. 1998). However, the Administrative Law Judge must apply substantial evidence, and "must examine the logic of [the parties'] conclusions and evaluate the evidence upon which their conclusions are based." Director v. Newport News Shipbuilding & Dry Dock Co., (Carmines), 138 F.3d 134, 140 (4th Cir. 1998). To be sufficient, the evidence must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 217, L.Ed. 126 (1938)).

Whether the Proposed Back Fusion Surgery is Reasonable and Necessary

Dr. Ots recommended that the Claimant undergo a posterior decompression and fusion at L3-4 (CX 7, p. 24). Following Dr. Ots' opinion that the Claimant should undergo a posterior decompression and fusion at L3-4, surgery was scheduled but then canceled by Crum & Forster (Tr. 60). Signal terminated temporary total disability benefits based on Dr. Ots' opinion that the accident causing the current disability pre-existed its insurance coverage. The Claimant testified that, if financially allowed to consult with Dr. Ots again, he "would undergo the treatment prescribed by Dr. Ots in July 2001 if it remained the only hope to regaining his pre-injury quality of life" (Tr. 62). The Claimant argues that the preponderance of the evidence establishes that on May 22, 2001, he suffered a work-related aggravation of his April 1997 lumbar spine injury. He requests that Signal, the Carrier on May 22, 2001, the date of the second injury,[10] bear financial responsibility for past and future medical compensation benefits stemming from the May 22, 2001 injury. In response, Marinette and Signal argue that the Claimant had a pre-existing degenerative condition and that benefits paid to the Claimant should be reimbursed.

A claimant must establish that the requested medical treatment is related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. However, where a second work-related injury aggravates the claimant's prior injury, further disabling the claimant, the second injury becomes the compensable injury, placing financial liability on the carrier providing insurance coverage on the date of the second injury. See Strachan

[10] The parties stipulated that Crum & Forster paid all reasonable and necessary costs of medical treatment through April 1999 resulting from the April 8, 1997 injury, and Signal paid temporary total disability benefits from July 17, 2001 to July 30, 2001 (C&FX 5, B-1, pp. 216-218).

Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g 15 BRBS 386 (1983); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd mem. sub nom. Williamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982).

For the reasons stated in the discussion of causal relation, I accord greater weight to Dr. Ots' opinion, and find that the Claimant's physical problems are causally related to the April 8, 1997 accident and the injuries sustained on May 22, 2001. Based upon his familiarity with the Claimant's physical condition and history, I accord substantial weight to Dr. Ots' opinion that the proposed posterior decompression and fusion surgery at L3-4 is the appropriate remedy for the Claimant's ongoing symptoms. Signal, the Carrier at the time of the second work-related injury, is responsible for the costs associated with this surgery, as well as temporary total disability compensation for the period of July 31, 2001 through September 9, 2001, and future temporary total disability compensation related to the May 22, 2001 injury, and for the reasonable and necessary costs of posterior decompression and fusion surgery.

Entitlement to Section 8(f) Relief for the Carrier on the Date of the Accident

Section 8(f) shifts the liability to pay compensation for permanent total disability from an employer to the Special Fund after 104 weeks if the employer establishes that: (1) the employee had a pre-existing partial disability; (2) this partial disability was manifest to the employer; and, (3) it rendered the second injury more serious than it otherwise would have been. See Director, OWCP, Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990). Relief is not available for temporary disability, no matter how severe. Jenkins v. Kaiser Aluminum & Chem. Sales, 17 BRBS 183, 187 (1985). I have found that Marinette and Signal failed to establish that the Claimant suffered from a pre-existing partial disability. The Claimant seeks recovery for temporary total disability only. As such, § 8(f) relief is not available to Marinette or Signal.

VI. ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, I make the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

Therefore, it is hereby ORDERED that,

1. Marinette and Signal shall pay any outstanding medical bills of the Claimant, Myron Baumler, relating to the May 22, 2001 accident, and shall continue to furnish reasonable, appropriate, and necessary medical care and treatment for the Claimant's work-related

injuries as required by § 7 of the Act, including posterior decompression and fusion surgery;

2. Marinette and Signal shall provide reasonable, appropriate, and necessary disability compensation following the posterior decompression and fusion surgery until such time as the Claimant is determined to have reached maximum medical improvement; and,

3. The Claimant's attorney shall file, within thirty (30) days of receipt of the Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer and Signal Mutual, who shall then have twenty (20) days to file objections. See 20 C.F.R. § 702.132.

A

Robert L. Hillyard
Administrative Law Judge

Dated:
at Cincinnati, Ohio